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Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-909

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Petitioners,

—v.—

PATSY T. MINK, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR CONSUMERS UNION OF UNITED STATES, INC., *AMICUS CURIAE*

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INDEX

PAGE

Interest of *Amicus* 1

ARGUMENT:

POINT I—

The Freedom of Information Act Requires That in Each *De Novo* Proceeding Under the Act, the District Court Be Satisfied That Agency Invocation of One of the Act's Exemptions Is Correct; This Is So Even if It Is Necessary for the Court to Conduct an *In Camera* Examination of the Documents in Order to Determine Whether the Privilege as Claimed Actually Exists 4

A. Blanket Classification of Materials Does Not of Itself Satisfy the Requirements of Exemption One. The Burden Is Therefore on the E.P.A. to Demonstrate Exemption of Each Particular Unit of Information Sought by Respondents 5

B. Factual Materials Do Not by Definition Fall Within the Explicit Coverage of Exemption Five. The Burden Is Therefore on the E.P.A. to Demonstrate Exemption of the Particular Factual Materials at Issue 8

PAGE

POINT II—

The District Court Is Competent to Conduct an *In Camera* Inspection of Documents Claimed to Be Blanketly Exempt for the Purpose of Separating Privileged Materials From Non-privileged Materials, and Compelling Disclosure of the Latter 11

POINT III—

The Authority of the Courts to Examine *In Camera* Documents Claimed to Be Privileged Either in Whole or in Part, and to Separate Such Documents Into Privileged and Non-privileged Portions for the Purpose of Disclosure Under the Freedom of Information Act Is of Utmost Importance to Consumers and to the General Public 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases:

Ackerly v. Ley, 420 F.2d 1336 9

Boeing Airplane Co. v. Coggeshall, 280 F.2d 654 .....8, 13

Bristol-Myers Co. v. Federal Trade Commission, 424 F.2d 935 5

Carl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena, 40 F.R.D. 318 9

Consumers Union of United States, Inc. v. Veterans Administration, 301 F. Supp. 796 .....2, 8, 10, 15

Consumers Union of United States, Inc. v. Veterans Administration, 436 F.2d 1363 2

PAGE

Getman v. N.L.R.B., 450 F.2d 670 ..... 2, 10

Machin v. Zuckert, 316 F.2d 336, *cert. den.* 375 U.S. 896 ..... 9, 13

New York Times Co. v. United States, 403 U.S. 713 ..6, 7, 12

Soucie v. David, 448 F.2d 1067 ..... 4, 7, 11, 13, 14

United States v. Lincoln Rochester Trust Co., 297 F.2d 891, *cert. den.* 369 U.S. 887 10

United States v. Reynolds, 345 U.S. 1 9

United States v. U.S. District Court for the Eastern District of Michigan, 40 U.S.L.W. 4767 ..... 7, 12

Wellford v. Hardin, 444 F.2d 21 ..... 4, 12

Statutes:

The Freedom of Information Act, 5 U.S.C. § 552 et seq.

5 U.S.C. § 552(b)(1) 5, 6

5 U.S.C. § 552(b)(5) 8, 9, 10, 11

5 U.S.C. § 552(c) 5

Other Authorities:

1970-71 Annual Report of the Administrative Conference of the United States, 53 ..... 13, 14

Consumer Reports 1

27 Consumer Reports 139 (1962) 14

27 Consumer Reports 446 (1962) 14

28 Consumer Reports 190 (1963) 14

28 Consumer Reports 448 (1963) 14

37 Consumer Reports 328 (1972) 3

PAGE

Davis, "The Information Act: A Preliminary Analysis," 34 U. of Chi. L. Rev. 761 (1967) 6, 9, 16

Exec. Order No. 10501, as amended 3 C.F.R. 292 (1971), 50 U.S.C. § 401 (Supp. 1972) 5

Graham, "The Pentagon Papers Trial: A Major Test of First Amendment," New York Times, July 26, 1972, 14 15

H.R. Rep. No. 1497, 89th Cong., 2d Sess. (1965) 9

Nader, "Freedom from Information: The Act and the Agencies," 5 Harv. Civ. Rights-Civ. Lib. L. Rev., 1 (1970) 16

Sen. Rep. No. 813, 89th Cong., 2d Sess. (1965) 4, 7, 9

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BRIEF FOR CONSUMERS UNION OF UNITED STATES, INC., *AMICUS CURIAE*

Interest of *Amicus*

Amicus is a non-profit organization, chartered in 1936 pursuant to the Membership Corporations Law of the State of New York, which performs tests on consumer products and provides information and advice to the general public on goods and services. *Amicus* publishes and sells the monthly magazine CONSUMER REPORTS, which has a current circulation in excess of 2,000,000.

In addition to maintaining testing and reporting services, Consumers Union pursues the following objectives, which are excerpted from its Certificate of Incorporation, and digested in the masthead of each issue of CONSUMER REPORTS:

"To provide consumers with information and counsel on consumers goods and services, to give information on all matters relating to the expenditure of the family income, and to initiate and to cooperate with individual and group efforts seeking to create and maintain decent living standards."

As a "leading consumer-oriented investigator of products," [1] *amicus* has a real and continuing interest in obtaining for its readers and the general public the fullest possible information on the testing, use and quality of various products on the market, much of which can only be obtained from various agencies of the federal government. While the testing services performed by *amicus* are necessarily limited by available funds, federal agencies test large numbers of products on a vast scale, gathering much information, unavailable elsewhere, which would be of untold benefit to millions of consumers in the United States.

Amicus, therefore, is deeply concerned that the provisions of the Freedom of Information Act, guaranteeing public access to most agency documents, be broadly construed, and its exemptions be narrowly construed, in accordance with Congress' intent. Indeed, *amicus* was the first to bring suit seeking product testing information under the Act. See *Consumers Union of United States, Inc.* v. *Veterans Administration, et al.,* 301 F. Supp. 796 (S.D.N.Y. 1970), appeal dismissed as moot, 436 F.2d 1363 (2d Cir. 1971). Additionally, Consumers Union appeared as *amicus curiae* in *Getman* v. *NLRB,* 450 F.2d 670, 67[illegible]

[1] See *Consumers Union of United States, Inc.* v. *Veterans Administration, et al.,* 436 F.2d 1363, 1365 (2d Cir. 1971), dismissing appeal as moot.

n. 25 (D.C. Cir. 1971), a decision which held that courts have no equitable jurisdiction under the Freedom of Information Act to deny disclosure on grounds other than those specifically set forth in one of the Act's enumerated exemptions. See "A Big Footnote in CU v. VA," 37 CONSUMER REPORTS 338 (1972).

Amicus believes that the principles involved in this case present important questions of law and policy affecting the consumer's and the general public's right to information under the Freedom of Information Act. In particular, it takes issue with the propositions advanced by the Environmental Protection Agency (E.P.A.): that the documents in question are exempt from the Freedom of Information Act, and that the courts are barred from examining these documents simply because Agency officials in their unchecked discretion have labeled them exempt.

E.P.A. misconstrues the issues before this Court. The Petitioner argues that once an agency official has marked a document as classified or as an inter- or intra-agency memorandum, the federal courts are barred from questioning the validity of that determination. Any ruling in support of this proposition, however, would render meaningless the nine exemptions to the Act specifically enumerated by Congress, and would allow federal agencies, through convenient juxtaposition of validly classified material with non-classified matter, to bar the entire lot of materials from court inspection, and thus through classification-by-association to frustrate the purpose of full disclosure intended by Congress in enacting the Freedom of Information Act.

At issue, rather, is whether the courts may make *in camera* inspections of documents *claimed* to be privileged

for the purpose of determining whether they are indeed so privileged, either in whole or in part, and for the purpose of separating privileged materials from the non-privileged in order to compel disclosure of the latter according to the Freedom of Information Act.

ARGUMENT

I.

The Freedom of Information Act Requires That in Each *De Novo* Proceeding Under the Act, the District Court Be Satisfied That Agency Invocation of One of the Act's Exemptions Is Correct; This Is So Even if It Is Necessary for the Court to Conduct an *In Camera* Examination of the Documents in Order to Determine Whether the Privilege as Claimed Actually Exists.

Both the legislative history and the express language of the Freedom of Information Act compel the conclusion, already accepted by the courts in *Soucie* v. *David*, 448 F. 2d 1067, 1080 (D.C. Cir. 1967), and *Wellford* v. *Hardin*, 444 F.2d 21, 25 (4th Cir. 1971), that the Act's exemptions are to be narrowly construed. Sen. Rep. No. 813, 89th Cong. 2d Sess. (1965) specifically asserts that according to the Act, "all materials of the Government are to be made available to the public by publication or otherwise, unless *explicitly* allowed to be kept secret by one of the exemptions . . .".

This Senate insistence on a policy of full disclosure except in explicitly delimited cases finds authoritative reinforcement in the final wording of the Act itself. That Congress intended to define and restrict the exemptions

to disclosure is made crystal clear in subsection (c) of § 552 of the Freedom of Information Act which unambiguously states: "This section does not authorize withholding of information or limiting the availability of records to the public; except as *specifically* stated in this section." 5 U.S.C. § 552(c) (emphasis added). Words like *specifically* and *explicitly* play, of necessity, an important role in the construction of the Act's exemptions. In *Bristol-Myers Co. v. Federal Trade Commission*, 424 F.2d 935 (D.C. Cir. 1970), the court of appeals noted with displeasure that the district judge had failed to examine the disputed documents, "and to explain the specific justification for withholding particular items," (424 F.2d at 938), thus raising substantial difficulties of interpretation for the appellate court.

A. *Blanket Classification of Materials Does Not of Itself Satisfy the Requirements of Exemption One. The Burden Is Therefore on the E.P.A. to Demonstrate Exemption of Each Particular Unit of Information Sought by Respondents.*

Exemption One protects from disclosure "matters . . . *specifically* required by Executive order to be kept secret in the interest of the national defense or foreign policy" (emphasis added). 5 U.S.C. § 552(b)(1). The E.P.A. has throughout this case relied on Executive Order 10501 as basis enough for fulfilling the requirements posed by the word "specifically" in the first exemption. This order, however, requires *blanket* classification of documents:

> "The document . . . shall bear only one overall classification, notwithstanding that pages, paragraphs, sections or components thereof bear different classifications." As amended, 3 C.F.R. 292 (1971), 50 U.S.C. § 401 (Supp. 1972).

The court of appeals below ordered the district court to find just such pages, paragraphs, sections and components which the E.P.A. here seeks to protect from disclosure, and to release those which it deems non-secret and separable from the secret remainder. That such material should remain undisclosed would clearly be contrary to Congress' intent in enacting the Freedom of Information Act. It has admittedly not been "specifically required by Executive order to be kept secret," but has been classified "Secret" by association only. It would be contrary to the mandate of Congress to broaden Exemption One, as the E.P.A. here contends must be done. A leading commentator on the Freedom of Information Act has stated:

> "Courts that usually constitute themselves working partners with legislative bodies to produce sensible and desirable legislation may follow their accustomed habits in *narrowing* the ascertainable meaning of the words of an exemption, but . . . they are restricted in following those habits in broadening that meaning." Davis, "The Information Act: A Preliminary Analysis," 34 U. of Chi. L. Rev. 761, 783-84 (1967).

The E.P.A. in its brief to this Court (p. 9) argues that Congress intended by Exemption One to accord broad respect for the Executive's decision as to classification. *Broad,* however, does not mean *unlimited.* In *New York Times Co.* v. *United States,* 403 U.S. 713 (1971), this Court found the government's claim for "broad respect" and privilege to be unfounded. In a concurring opinion joined by Mr. Justice White, Mr. Justice Stewart stated:

> "[T]he only effective restraint upon executive policy and power in the areas of national defense and inter-

national affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government." (403 U.S. at 728).

Though the court need not inspect documents *in camera* if government agencies describe their relevant features sufficiently to satisfy the court that a claim of privilege is justified, the court must be free to do so, even when the government asserts that public disclosure would be harmful to the national defense or foreign policy. *Soucie* v. *David, supra.* *Soucie* involved claims for documents concerning the federal government's program for the development of the S.S.T., clearly a matter of importance both to national defense *and* foreign policy. The court there held nonetheless that the Freedom of Information Act, by requiring a trial *de novo* in which the burden rests on the government to prove that an appropriate and specific executive order has been made, clearly rejects any hint of the traditional "deference to administrative determinations" (448 F.2d at 1077).

Each proceeding under the Freedom of Information Act is required to be *de novo* "in order that the ultimate decision as to the propriety of the agency's action is made by the court," and to "prevent it from becoming meaningless judicial sanctioning of agency discretion." Sen. Rep. No. 813, *supra,* p. 8. The danger of leaving such ultimate decisions up to an executive agency has been recognized elsewhere by this Court. As Mr. Justice Powell stated for the Court in *United States* v. *U. S. District Court for the Eastern District of Michigan,* 40 U.S.L.W. 4767 (June 19, 1972), "executive discretion may yield too readily to pressures" in seeking to maintain national security. The courts,

together with Congress, must act as required by our balance-of-powers system to offset that executive tendency and its concomitant threat to our constitutional scheme of government.

B. *Factual Materials Do Not by Definition Fall Within the Explicit Coverage of Exemption Five. The Burden Is Therefore on the E.P.A. to Demonstrate Exemption of the Particular Factual Materials at Issue.*

The E.P.A. argues (Petitioner's brief, p. 39) that the fifth exemption was intended by Congress to bar disclosure of factual as well as nonfactual material in order to guarantee frank discussion of policy matters by agency officials. In light of the strong Congressional purpose to promote disclosure evidenced by passage of the Freedom of Information Act, however, it is clear that factual material was *not* intended to fall within the explicit coverage of the fifth exemption, which protects from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency", 5 U.S.C. § 552(b)(5). *Consumers Union* v. *Veterans Administration,* 301 F. Supp. at 805. The E.P.A. fails to realize that disclosure of purely factual material would in no way impinge on the guarantee of frank policy-matter discussion. *Boeing Airplane Co.* v. *Coggeshall,* 280 F.2d 654, 661-62 (D.C. Cir. 1960).

The E.P.A.'s argument, furthermore, expands fifth exemption policy to a point dangerously in conflict with the purpose of the Freedom of Information Act:

> "The problem is not the essential soundness of the policy but the inevitable temptation of a governmental litigant to give it an expansive interpretation in re-

lation to the particular records in issue." *Ackerly* v. *Ley*, 420 F.2d 1336, 1341 (D.C. Cir. 1969).

Recognizing this problem, the court in *Machin* v. *Zuckert*, 316 F.2d 336 (D.C. Cir. 1963), *cert. den.* 375 U.S. 896 (1963), required the Air Force, despite a claim of privilege, to produce "factual findings" included in a particular Air Force report dealing with an airplane crash, and containing certain classified information about the plane and its mission at the time of the crash, because the Air Force had failed to demonstrate to the court's satisfaction that disclosure might be dangerous. Thus, if in a given situation nondisclosure is crucial as to certain factual materials, the burden is on the government agency to so demonstrate to the court. *United States* v. *Reynolds*, 345 U.S. 1, 9 (1953); *Carl Zeiss Stiftung* v. *V. E. B. Carl Zeiss, Jena*, 40 F.R.D. 318, 331-32 (D.D.C. 1966).

In a desperate attempt to prevail even if the Court should find that the fifth exemption *does* permit disclosure of factual materials, the E.P.A. cites the wording of H.R. Rep. No. 1497, 89th Cong. 2d Sess. (1965) (Petitioner's Brief, p. 11), which states that the only disclosable materials are those which would *routinely* be disclosed through discovery to a private party in litigation with the agency. Neither Sen. Rep. No. 813, *supra*, nor the final wording of the Act itself includes that qualifying word, however. Indeed, the House Committee only wrote this limitation and others like it into its report when it was subjected to outside pressure to restrict the Senate bill (Davis, *supra*, at 805); the House actually passed the same bill as the Senate. Clearly, the wording of the statute itself, passed by both houses of Congress, must prevail over that of a

committee report from one house which was never voted upon or even considered by the other house. *United States* v. *Lincoln Rochester Trust Co.*, 297 F.2d 891 (2d Cir. 1962), *cert. den.* 369 U.S. 887 (1962). Indeed, the district court in *Consumers Union* v. *Veterans Administration, supra,* in choosing between the Senate and House Committee interpretations of the Freedom of Information Act, preferred the former, "since its report was before both houses of Congress . . . is more consistent with the purpose of the Act and . . . avoids a possible internal contradiction." 301 F. Supp. at 801. *Accord, Getman* v. *NLRB, supra,* at 673 n. 8.

The district court in *Consumers Union* v. *Veterans Administration, supra,* defined the scope of the fifth exemption as follows:

> "To determine if the requirements of the 5th exemption are met, this court must ask if the records sought are inter- or intra-agency memoranda or letters which would not be available to *any* party in *any* litigation in which the agency having the records might now be involved. The fulcrum of this test is discovery practices as regulated by the courts, not discovery as it is practiced by the government. . . ." *Id.* at 804.

It is respectfully submitted that the documents sought by Respondents here clearly do not satisfy the above test which must be met to justify exemption.

II.

The District Court Is Competent to Conduct an *In Camera* Inspection of Documents Claimed to Be Blanketly Exempt for the Purpose of Separating Privileged Materials From Non-privileged Materials, and Compelling Disclosure of the Latter.

The court of appeals below ordered the district court on remand to examine the documents in question, looking to possible separation of them for purposes of disclosure and nondisclosure. In doing so, it adhered to the rule expounded in *Soucie* v. *David, supra,* that according to the Freedom of Information Act, "factual information may be protected only if it is inextricably intertwined with policy-making processes" (448 F.2d at 1077-78). In response, the E.P.A. proffers before this Court two weak and unpersuasive arguments. First, it maintains (Petitioner's brief, p. 39) that a fact-policy distinction as regards Exemption Five is unsound because fact portions are virtually certain to be inextricably bound into policy portions. If this were so in any given case, however, the federal agency involved would clearly risk nothing by an *in camera* examination of the documents; the court, unable to separate, would be unable to disclose.

Secondly, the E.P.A. maintains (Petitioner's Brief, p. 28) that the federal courts, "are not well-equipped to make the decisions that the court of appeals has required the district court to make in this case . . . whether a document requires a top secret or secret classification and whether that classification can safely be removed or changed." Though the E.P.A. claims that such decisions

both as to documents and as to parts of documents are prerogatives peculiarly within the province of the Executive, the courts have often recognized that there is no lack of judicial power or expertise to make that determination.

This Court, for example, by its decision in *New York Times Co.* v. *United States, supra,* determined that it is appropriate for federal judges to consider whether various portions of a classified document ought to be released. More specifically, this Court responded to an argument very similar to that advanced here by the E.P.A. in *United States* v. *U. S. District Court for the Eastern District of Michigan, supra.* Mr. Justice Powell in speaking for the Court stated:

> "We cannot accept the Government's argument that internal security matters are too subtle and complex for judicial evaluation. Courts regularly deal with the most difficult issues of our society. There is no reason to believe that federal judges will be insensitive or uncomprehending of the issues involved in domestic security cases . . . If the threat is too subtle or complex for our senior law enforcement officers to convey its significance to a court, one may question whether there is probable cause for surveillance. . . . The investigation of criminal activity has long involved imparting sensitive information to judicial officers who have respected the confidentialities involved. Judges may be counted upon to be especially conscious of security requirements in national security cases." 40 U.S.L.W. at 4768.

As regards the Freedom of Information Act specifically, the Fourth Circuit held in *Wellford* v. *Hardin, supra,* that

it is a violation of the Act to withhold a document on the ground that parts of it are exempt and parts not exempt; "suitable deletions" should be made by the court so as to disclose the nonexempt remainder of the document. See also *Machin* v. *Zuckert, supra.* Similarly, in *Soucie* v. *David, supra,* in discussing a report on government activities in relation to the S.S.T., the court stated that inspection of the report would enable the district judge on remand "to delete any privileged matter, so that the remainder may be disclosed in accordance with the policies of the [Freedom of Information] Act" (448 F.2d at 1079).

In light of these precedents, *amicus* respectfully submits that the E.P.A. contention that courts cannot be entrusted with the task of *in camera* review here plainly has no basis in law. It is entirely proper and consistent with the role of the judiciary under our constitutional system for the courts to undertake such inspections, "keeping in mind the issues of the case, the nature and importance of the interests supporting the claim of privilege, and the fundamental policy of free societies that justice is usually promoted by disclosure rather than secrecy." *Boeing Airplane Co.* v. *Coggeshall, supra,* at 662.

Furthermore, the option to itself voluntarily separate commingled exempt and non-exempt materials always remains open to a federal agency. The Administrative Conference of the United States, entrusted with the power to adopt recommendations which it considers appropriate for improving administrative procedures in federal agencies, has even adopted the following standard as part of its "Principles and Guidelines for Implementation of the Freedom of Information Act":

"Where a requested file or record contains exempt information that the agency wishes to maintain confidential, it should offer to make available the file or a copy of the record with appropriate deletions if this can be done without revealing the exempt information." *1970-71 Annual Report of the Administrative Conference of the United States,* at 53.

III.

The Authority of the Courts to Examine *In Camera* Documents Claimed to Be Privileged Either in Whole or in Part, and to Separate Such Documents Into Privileged and Non-privileged Portions for the Purpose of Disclosure Under the Freedom of Information Act Is of Utmost Importance to Consumers and to the General Public.

The public interest in obtaining information such as that sought here by petitioners can hardly be denied. "The public's need for information is especially great in the field of science and technology, for the growth of specialized scientific knowledge threatens to outstrip our collective ability to control its effect on our lives." *Soucie* v. *David, supra,* at 1080. To recognize this truth the Court need only look at a hypothetical situation, one highly similar to the one at hand. Suppose, after a nuclear test such as Cannikin, Respondents, or *amicus* itself,[2] were to seek disclosure of agency reports showing the resulting rela-

[2] The concern of *amicus* in this matter is amply demonstrated by the numerous articles in CONSUMER REPORTS on the effect of radiation from atomic testing on foods normally included in the human diet. See 27 CONSUMER REPORTS 139, 446 (1962); 28 CONSUMER REPORTS 190, 448 (1963).

tive amounts of radioactive matter in various organic food products.

Clearly, the consuming public would have a valid and, indeed, urgent interest in attaining disclosure of such reports. Yet the governmental agencies involved could well advance the same arguments for nondisclosure that the E.P.A. here seeks to assert. That this is not a fanciful supposition is borne out in a recent article in the New York Times, as follows:

> "In the past, the secrecy system has often been abused to the point that the military's purchases of peanut butter and paint have been known to be classified confidential." Graham, "Pentagon Papers Trial: A Major Test of First Amendment," *New York Times*, July 26, 1972, p. 14.

See also *Consumers Union* v. *Veterans Administration*, 301 F. Supp. 796, where the defendant federal agency strenuously opposed the release of hearing aid test scores, hardly a matter urgently in need of "confidential" classification.

In both the real and the hypothetical cases, because the Freedom of Information Act was intended to benefit the public generally, "it is primarily the effect on the public rather than on the person seeking the records that must be weighed." *Consumers Union* v. *Veterans Administration*, 301 F. Supp. at 806.

The courts, furthermore, in weighing the public interest, must look realistically at the state of administrative compliance with the Act and cooperation with its aims. As one noted consumer advocate has stated:

> "After three months of exploring the frontiers of the Freedom of Information policy of several federal agencies, . . . I have reached a disturbing conclusion: government officials at all levels in many of these agencies have systematically and routinely violated both the purposes and specific provisions of the law. These violations have become so regular that they seriously block citizen understanding and participation in government. Thus the Act, designed to provide citizens with tools of disclosure, has been forged into a shield against citizen access. There is a prevailing, official belief that these federal agencies need not tolerate searching inquiries or even routine inquiries that appear searching because of their infrequency." Nader, "Freedom from Information: The Act and the Agencies," 5 Harv. Civ. Rights-Civ. Lib. L. Rev. 1, 12 (1970).

See also Davis, *supra,* at 805, and at 761, where he points out that all of the federal agencies opposed passage of the Freedom of Information Act.

Few consumers or consumer groups can afford to sue in response to such administrative violations. Unless this Court clearly and unequivocally affirms the decision of the court below, administrative recalcitrance in the federal agencies may well, as described above, frustrate the consumer, both as an individual and as a class, in the rightful pursuit of government information and may well render meaningless both the letter and the spirit of the Freedom of Information Act.

CONCLUSION

The E.P.A. erroneously seeks to deny the federal judiciary its authority, under the Freedom of Information Act, to examine *in camera* materials claimed to be exempt, and to disclose portions thereof which it deems to be non-privileged according to the requirements of that Act. It is respectfully urged that such a denial cannot stand, and that this Court should affirm the decision of the Court of Appeals for the District of Columbia Circuit.

August, 1972.

Respectfully submitted,

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